IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-2048

UNDER	the Companies Act 1993
BETWEEN	JOHN MICHAEL GILBERT, LIQUIDATOR OF CRYSTAL WATERS MANAGEMENT LTD (IN LIQUIDATION) First Plaintiff
AND	CRYSTAL WATERS MANAGEMENT LTD (IN LIQUIDATION) Second Plaintiff
AND	ABOUT BODY CORPORATES LTD First Defendant
AND	BODY CORPORATE NO 382272 Second Defendant

Hearing: 17 June 2009

Appearances: Patricia Mills for Plaintiffs
David Chisholm for Defendants

Judgment: 23 June 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 4:00 pm on 23 June 2009

SOLICITORS
Metro Law (Auckland) for Plaintiffs
Wynyard Wood (Auckland) for Defendants

COUNSEL
Patricia Mills; David Chisholm

Introduction

[1] This application for an interim injunction is the consequence of two unusual events.

[2] One is the attempt by Mr Christopher Hook, the former owner of a failed resort development in Northland, to secure for himself or his interests a 30 year inflated income stream from the property through the medium of a management contract for 25 residential units entered into between a management company which Mr Hook controlled and the Body Corporate. The other is the election by the liquidator of the management company, Mr John Gilbert, to attempt to carry on the company's business since his appointment nearly a year ago instead of taking prompt steps to sell its assets and wind up its operations.

[3] The result has been a breakdown in the relationship between Mr Gilbert and most of the unit owners and Mr Hook's mortgagees, who accuse Mr Gilbert of incompetence and failing to account. While neither is a party to the management contract, Mr Gilbert by virtue of his decision to continue trading is effectively responsible for its performance and the unit owners and Mr Hook's mortgagees bear the corresponding benefit or burden.

[4] The fate of Mr Gilbert's interlocutory application will be determined by the arguability of his confined grounds for seeking injunctive relief. The primary inquiry is into whether the application raises a serious question for trial. If so, the focus shifts to the balance of convenience and, where necessary, questions of fairness.

Background

[5] Crystal Waters Ltd (CWL) was owned and controlled by Mr Hook and another party, Mr Robert McEwen, and their interests. The company developed a residential resort of 25 units on a site at Cable Bay, Northland, known as Doubtless Bay Villas. The apparent objective was to sell the units to third parties who would derive income by letting the properties when not used by the owners. An additional

purpose-built management unit was (and still is) owned by Crystal Waters Management Ltd (CWM), the management company. A Body Corporate was incorporated for the limited purposes required by the Unit Titles Act 1972.

[6] CWL, CWM and the Body Corporate entered into the management contract in June 2007. Its terms are extensive and include the Body Corporate's agreement to pay CWM a management fee of $75,000 per annum, reviewable in 12 months and continually adjustable upwards. The initial term was for 10 years but extendable at CWM's option for two further terms, to a total duration of 30 years. The Body Corporate also granted CWM the exclusive right to provide letting services for units at a fee of 14% of the gross rental. The Body Corporate was also to pay CWM an initial annual rental of $31,200 reviewable upwards for the management unit. The right of occupation of that unit is tied to the management contract.

[7] As Mr Chisholm points out, the management agreement obliges the Body Corporate to pay CWM gross escalating annual payments in excess of $100,000 for services which in substance are those of a caretaker only. Any services provided by CWM to the proprietors or occupiers of the units are to be the subject of additional charges. The manager is also entitled to undertake other work not covered by the management fee.

[8] A unit owner who elects to use the letting service provided by the manager must enter into a separate agreement with CWM, whose rights in this area are exclusive. Under those standard letting contracts CWM assumed obligations to use its best endeavours to cause the units to be occupied and to supply monthly statements to owners detailing income and expenses. It was also bound to maintain owners rental receipts in a separate bank account for each unit, and to pay the rental profit monthly to each owner.

[9] Between 15 June 2007 and 2 July 2008 CWL sold 10 units to individual owners. The company transferred another five to entities related to Messrs Hook and McEwen which are mortgaged to Marac Finance Ltd. The remaining 10 units were retained by CWL and charged to North South Finance Ltd (which is itself subject to a moratorium). CWM's management unit is subject to mortgage to the Bank of

New Zealand, which has a general security agreement over the company's assets. Ms Mills advises that CWM owes at least $700,000 to the bank.

[10] Mr Gilbert was appointed when CWM was placed in liquidation on 2 July 2008. CWL was also wound up at about the same time (different liquidators were appointed). CWL and Messrs Hook and McEwen were in default of their financing obligations to Marac and North South Finance.

[11] Also, CWL and Messrs Hook and McEwen failed to pay their fees to the Body Corporate. As a result, the latter defaulted on its contractual obligations to pay management fees to CWM. The Body Corporate owed CWM $73,131 for unpaid management fees and rental on the management unit on the date of Mr Gilbert's appointment.

[12] Mr Gilbert did not immediately terminate the management contract and recover the outstanding debt from the Body Corporate, even though he concluded that it was insolvent. Instead he continued CWM's business for the stated purpose of seeking a sale of the management agreement to a third party. Mr Gilbert reached an interim arrangement with the Body Corporate to pay reduced fees and rental for the manager's unit. The Body Corporate met these payments for July, August, September and October. But it ran out of funds in November 2008 because CWL and latterly the mortgagees had failed to pay outstanding levies. One further payment was made in February 2009. The Body Corporate's current indebtedness to CWM is $53,272.

[13] Mr Gilbert says that he has been attempting throughout the past year to sell CWM's assets. In essence there are only two: the manager's unit, with dedicated reception and telecommunication services installed for the purpose of running the business; and the right to perform services under the management agreement (CWM has the ultimate power to approve an assignee of its rights). Mr Gilbert values the unit at $500,000 and the agreement at $150,000.

[14] Individual unit owners became increasingly dissatisfied with Mr Gilbert's performance from late 2008. That dissatisfaction is apparently shared by North

South Finance Ltd. It culminated in a decision by the Body Corporate to call an extraordinary general meeting on 30 March 2009. The purpose, although allegedly not stated in the notice, was to pass a resolution to cancel the management contract. The Body Corporate was entitled to take this step if the manager entered into liquidation (clause 14.1(c)). A resolution was passed unanimously and notice of termination was given to Mr Gilbert later that day.

[15] Those events generated Mr Gilbert's application to this Court for injunctive relief on 8 April 2009. He challenged the validity of the Body Corporate's notice of termination. He sought an urgent ex parte injunction because of his concerns that the Body Corporate's action might endanger booking arrangements for the Easter vacation which was due to commence. The Body Corporate and the owners through their solicitors offered to postpone any steps until after the Easter vacation on conditions that, first, Mr Gilbert disclosed the identity in advance of third parties which had made accommodation bookings for the Easter period and, second, the funds paid or to be paid by those parties to rent the units were deposited into a separate solicitors trust account pending resolution of the dispute.

[16] Mr Gilbert rejected this proposal. He considered the Body Corporate's conditions were unreasonable and unnecessary. He described the condition for deposit of rentals into an independent trust account as 'naïve'. He advised that he had incurred substantial personal liabilities in carrying on CWM's business.

[17] On 9 April Asher J made interim orders by consent pending an early hearing of Mr Gilbert's application.

[18] Mr Gilbert has reconstructed a balance sheet for CWM, showing that assets exceed liabilities by $36,964. However, this result is only achieved by the problematic route of attributing a value of $150,000 to the management contract. Mr Gilbert believes his appointment 'was for the purpose of effecting a reconstruction of the company's affairs'. I share Mr Chisholm's reservations about that proposition. CWM could not meet its debts and had failed to account to owners for rental receipts. The company was placed into liquidation because it was insolvent, as Mr Gilbert pleads. In these circumstances the liquidator's principal

duty was to take possession of, protect, realise and distribute CWM's assets: s 253 Companies Act. Mr Gilbert may be confusing his statutory duties as liquidator with the voluntary administration provisions: see s 239A.

[19] Mr Gilbert also says that the Body Corporate's notice of cancellation is interfering with his ability to sell CWM's assets and conclude its liquidation. I have reservations about that proposition also. As noted, the Body Corporate is insolvent on Mr Gilbert's own assertion, and its termination of the management contract will not affect its value.

[20] Both Mr Gilbert and CWM are nominated as plaintiffs. But only Mr Gilbert seeks injunctive relief. He applies to restrain the Body Corporate from 'preventing [Mr Gilbert] from continuing the business of [CWM] **of letting the units** … and otherwise interfering in [Mr Gilbert's and CWM's] rights under the management agreement and **letting agreements**' [emphasis added]. Mr Chisholm correctly notes that the emphasised parts of Mr Gilbert's prayer for relief could never be sustained given that CWM and the owners are the parties to the discrete letting agreements, and the owners are not defendants in this proceeding.

Decision

(1) Serious Question

[21] The first and contested area of inquiry at this interlocutory stage is whether or not Mr Gilbert's discrete claim, given that he is the sole applicant for injunctive relief, raises a serious question for trial. That issue is: does Mr Gilbert have standing in his personal capacity as liquidator to sue the Body Corporate and, if so, is there a legally arguable basis for his claim?

(a) Standing

[22] On the standing issue, Ms Mills relies on the liquidator's statutory rights and powers. She acknowledges that his primary duty is to 'take possession of, protect,

realise and distribute the assets, or the proceeds of realisation of the assets to its creditors…': s 253(a) Companies Act 1953. She points out that the liquidator has the powers 'necessary to carry out [his] functions and duties … under [the] Act': s 260(1). She emphasises in particular the liquidator's power to 'commence, continue, discontinue and defend legal proceedings' and 'to the extent necessary for the liquidation carry on the business of the company': Sixth Schedule 6(a) and (b).

[23] Accordingly, Ms Mills submits, Mr Gilbert is empowered to bring proceedings in the company's name to enforce its rights and also in his own name to enforce his own rights. She submits that the right which Mr Gilbert seeks to enforce in this proceeding is personal. She identifies it as the statutory right to enforce the prohibition upon a party from exercising or enforcing 'a right or remedy over or against the property of the company': s 248. She relies on the decision of Master Faire in *Waller v Paul* (1997) 10 PRNZ 607.

[24] I agree with Mr Chisholm to the contrary. I am not satisfied that Mr Gilbert has standing. Section 248, upon which Ms Mills relies, is directed to the effect of the commencement of liquidation. It prohibits third parties from either commencing or continuing legal proceedings against the company 'or in relation to its property' or from exercising rights or remedies over or against the company's property. The section is silent as to the identity of the party entitled to apply to enforce the prohibition.

[25] As a preliminary matter, I doubt that the Body Corporate's notice of cancellation could ever constitute the enforcement or exercise of rights 'over or against the property of the company' within the meaning of s 248. That section is plainly directed at securing the company's assets in existence at the date of liquidation against a step taken by one creditor exercising its legal rights to gain a benefit at the expense of other creditors. CWM's particular item of property was its absolute right to sue the Body Corporate for a debt of $73,171. The reference to 'over' or 'against' the company's property confirms the prohibition on action which might adversely affect or prejudice its value to the creditors. A debtor resorting to its contractual right to terminate a contract with a company that is to be wound up, and thus unable to continue meeting its obligations, does not fall within the reach of

s 248. This approach is consistent also with the liquidator's duty to sell the assets and complete the liquidation reasonably and efficiently. I do not consider that s 248 assists Mr Gilbert.

[26] However, assuming to the contrary for the purposes of argument, the statutory provisions do not alter the nature of the liquidator's status as the company's agent. He assumes the powers and duties previously exercised by the directors. He must act for and on behalf of the company: see *Dunphy v Sleepyhead Manufacturing Ltd* [2007] 3 NZLR 602 (CA) at [19]-[25]. As the Court observed in *Sleepyhead* at [24], the Sixth Schedule powers are consistent with the role and function of agency.

[27] Consistent also with this analysis, an agent does not have a right to issue proceedings in the name of the principal unless in special circumstances: *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* CA 144/06 18 December 2007 at [94], approving *Bowstead & Reynolds on Agency* (18 Ed : 2006) at [9-002 to 9-010]. Thus directors cannot issue proceedings in their own name where the right belongs to the company. The rights vested by the management agreement, to the extent that they are property of the company, belong to it. CWM alone has the right to enforce the contract or more particularly to apply to restrain the other party's exercise of rights under it. It follows that the liquidator's statutory power to commence legal proceedings relating to the agreement is to be exercised in the company's name.

[28] As Mr Chisholm submits, Master Faire's decision in *Waller v Paul* conforms with this analysis. The Master noted that the Sixth Schedule power to commence legal proceedings omitted the additional words which appeared in the Companies Act 1955 'in the name and on behalf of the company'. He concluded that this omission recognised the wider right of a liquidator to bring proceedings either in his own name or in the name of and on behalf of the company, depending upon the nature of the right. One such express right, to which Mr Chisholm draws attention, is s 301, allowing the liquidator to issue proceedings in his own name. Master Faire was satisfied in *Waller* that the liquidator was enforcing a right which belonged to the company, and had no standing to issue the proceeding.

[29] Mr Gilbert may have been able to issue this proceeding in his own name if, for example, he had taken an assignment or transfer of CWM's rights under the management contract. But he does not argue to that effect and there is no evidential foundation for it. Doubtless Ms Mills appreciates the risks inherent in a proposition that Mr Gilbert has assumed personal obligations to the Body Corporate pursuant to the management contract.

[30] In my judgment Mr Gilbert has no status to apply for injunctive relief against the Body Corporate in his own name and his application must fail on that ground alone.

(b) Arguable Right

[31] If that conclusion is wrong, the question is whether if he has status Mr Gilbert has a legally arguable right against the Body Corporate. The answer turns upon the validity of the Body Corporate's notice of cancellation.

[32] Mr Chisholm submits that the management contract is ultra vires the Body Corporate. Its powers derive from the Unit Titles Act and its duties are generally limited to arranging insurance, keeping the common property in a state of good repair, and establishing and maintaining associated funds, with rights to levy contributions on proprietors: s 15. Its powers are those 'reasonably necessary to enable it to carry out … the duties imposed on it by this Act and by its rules': s 16. The rules must not confer any powers or duties which are not incidental to the performance of the statutory powers or duties: s 37(5).

[33] In particular, s 37(6) provides:

> No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.

[34] The nature of these powers and obligations was summarised by Paterson J in *Chambers v Strata Title Administration Ltd* (2005) 5 NZ Conv C 193,864 at [41]:

> The duties specified in the Act relate to insuring the buildings and other improvements on the land, paying the premium on the insurance policies, keeping the common property in a state of good repair, complying with notices issued by local authority or public body requiring repair work, the control, management and administration of the common property, the enforcement of any lease or licence under which the land is held, the enforcement of any contract of insurance, the establishment of a maintenance fund for administrative and other expenses, and the levying of the proprietors to maintain this fund. The statutory rules contain a provision headed 'Powers and Duties of Body Corporate'. The duties relate to the repair and maintenance of chattels, fixtures and fittings, the repair and maintenance of essential services, and the production on request by certain people of insurance policies.

[35] In *Russell Management v Body Corporate 341073* (2009) 6 NZ Conv C 194,699, Lang J followed Paterson J's analysis and concluded that exclusive leasing arrangements contained in a Body Corporate's rules and a management agreement in circumstances very similar to these were ultra vires and not enforceable. The Judge dismissed an application for an interim injunction brought by the management company to restrain the Body Corporate from taking any steps to enforce its notice of termination of the management contract. Lang J found that the exclusive letting provisions in the management agreement were ultra vires. The Judge noted, however, that the invalidity of part or parts of the management contract does not mean that the instrument as a whole was invalid.

[36] Ms Mills concedes that the exclusive leasing provisions of this management contract were invalid but not the contract as a whole. In effect she submits that the offending provisions are severable. Her argument draws support from these passages from Lang J's judgment in *Russell Management*:

> [65] In the present case the provisions of the management agreement that relate to the exclusive letting service are few in number and are easily identifiable. The agreement contains numerous other obligations and duties that are entirely unrelated to the letting service. Moreover, the management fee that is payable to the Building Manager under the agreement does not include a component that relates to the provision of the letting service.
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> [66] I have no doubt that the exclusive letting provisions formed a vitally important part of the agreement from RML's perspective. The management agreement also, however, provided that RML was to receive the management fee of $30,000 per annum. It also provided benefits that must have been of value to the body corporate. In particular, it provided the body corporate with the services of a building manager who was obliged to look after and administer the common property. That must have been a reasonably significant aspect of the agreement from its perspective.

> [67] I therefore consider that it is at least arguable that the offending provisions did not form the dominant element of the management agreement, and that they are therefore potentially severable from the remaining provisions of the agreement.
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> [68] That being the case, I am not satisfied that the body corporate has a complete defence to the plaintiffs' claim. Although it may not be worth their while to do so given my conclusions on the issue of *vires*, the plaintiffs remain entitled to pursue their claim to the extent that the management agreement may remain intact. For this reason it would not be appropriate to enter summary judgment against the plaintiffs at this stage.

[37] I agree with Ms Mills for the reasons given by Lang J. It is arguable that the exclusive letting provisions of this management contract are severable from the document as a whole. It does not necessarily follow, however, from that conclusion that Mr Gilbert's claim if he has standing is seriously arguable. There is no doubt that the Body Corporate has an absolute contractual right to terminate in the event of CWM's liquidation. But Ms Mills raises arguments about the notice's invalidity and the Body Corporate's affirmation of the contract or estoppel by conduct.

[38] Ms Mills says that the Body Corporate's notice of cancellation is invalid because CWM, as a unit owner and thus a member, did not receive proper notice of the extraordinary general meeting. That may or may not be so, although Mr Gilbert acting as the company's liquidator did in fact attend. But the right to challenge validity for failure to comply with the Body Corporate's rules lies with CWM, not Mr Gilbert, and in its capacity as a member of the Body Corporate. CWM has no independent right in its separate capacity as a contracting party to challenge the validity of a notice issued by the other party on the ground of a lack of power or capacity. The fact that the Body Corporate's notice of termination may have been the result of an invalidly convened meeting cannot affect its validity as a lawful act of cancellation if given in accordance with the provisions of the contract. (In any event, the unanimous nature of the resolution to cancel arguably cures or remedies any breach of rules in calling the meeting.)

[39] There can be no argument of affirmation, waiver or estoppel. I repeat that the contract is between CWM and the Body Corporate. Mr Gilbert himself says that following his appointment he (that is, Mr Gilbert) 'entered into an interim arrangement' with Ms Sharron O'Sullivan, the Body Corporate's representative,

whereby he would continue CWM's business and the Body Corporate would make interim payments until it was able to collect outstanding fees (from the mortgagees for Messrs Hook and McEwen). The Body Corporate made interim monthly payments of $3,333.33 for five months but then stopped.

[40] These steps could never constitute an affirmation, waiver or estoppel. All other considerations aside, the evidence does not approach the degree of unambiguity and unequivocality in the parties dealings necessary to satisfy those legal principles. As Mr Gilbert says, the arrangement was of a temporary measure, designed to allow the Body Corporate time to collect outstanding fees. In Mr Gilbert's own words, he agreed 'to continue to conduct the company's business while [the Body Corporate] required the mortgagees to pay the outstanding levies'.

[41] Ms Mills advanced a new argument at the hearing that each unit owner had become a party to the management agreement upon purchasing a unit. I agree with Mr Chisholm that that proposition is unsupported by the evidence.

[42] Accordingly, I am satisfied that there is no arguable issue for trial.

(2) Balance of Convenience

[43] While it is not necessary for me to consider this issue given my primary conclusion, I should record that I would have found that the balance of convenience did not favour Mr Gilbert even if he had a seriously arguable issue for trial. I can explain my reasons shortly.

[44] Ms Mills submits that damages would not be an adequate remedy for Mr Gilbert given the Body Corporate's insolvency. She refers to Mr Gilbert's experience that the Body Corporate is unable to meet its debts as and when they fall due, and observes that an indirect right of recourse against the owners by way of levy is only as good as their ability to pay. On the other hand, Ms Mills submits, damages will be an adequate remedy for the Body Corporate if at trial the Court finds that it was entitled to cancel the management agreement.

[45] The premise for Ms Mills' argument proves its untenability. On her case, the Body Corporate is and has been insolvent throughout. Mr Gilbert says that his objective is to sell the management unit and management contract, preferably as a composite package. He values its components, as noted, at $500,000 and $150,000 respectively. He is concerned that cancellation of the contract will prejudice his attempts to sell the unit, to the detriment of creditors. However, I consider termination of the management contract is inevitable and I doubt that its rights have any real value to a third party where the Body Corporate is insolvent on Mr Gilbert's assertion. And the agreement can simply be bought to an end by the Body Corporate winding itself up if necessary.

[46] Mr Gilbert is aware of the reality that the unit owners have no trust or confidence in him. They will not co-operate in paying levies to a Body Corporate to meet a financial obligation of doubtful legal and commercial probity. It is appropriate for the parties to sever ties and pursue remedies in damages. The Court will not exercise its equitable powers to grant a remedy that 'yolks the parties together in a continuing hostile relationship': *Co-operative Insurance Ltd v Argyll Stores* [1998] 1 AC 1 per Lord Hoffman at 16.

[47] Mr Gilbert confirms that the Body Corporate has paid nothing since February 2009. CWM can only enforce its compliance by bringing a claim for damages; whether the contract is alive or terminated is irrelevant in that context. It can hardly be said that it is in CWM's interests to attempt to maintain a contractual relationship with a party which it knows is insolvent and will always struggle to meet its financial obligations.

[48] To the extent that any remedy may ultimately prove adequate, damages would be appropriate in this respect. Mr Gilbert has not established that the balance of convenience favours an injunction.

Result

[49] Mr Gilbert's application for an interim injunction is dismissed. Costs must follow the event. Mr Gilbert is ordered to pay the Body Corporate costs according to category 2B and disbursements. I certify for two counsel.

[50] I wish to express my appreciation to Ms Mills and Mr Chisholm for the qualify of their submissions, both written and oral.

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Rhys Harrison J